IN THE

Supreme Court of the United States

October Term, 1975
No. 75-1522

SANDRA KANTROWITZ, Delaware Valley Mental Health Foundation, 833 Butler Avenue, Doylestown, Pennsylvania 13901, on her own behalf and on behalf of all others similarly situated,

Petitioner,

vs.

CASPAR WEINBERGER, individually and in his official capacity as Secretary of the United States Department of Health, Education and Welfare, 330 Independence Avenue, S. W., Washington, D. C. 20201,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975
NO. _____

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SANDRA KANTROWITZ, Delaware Valley Mental Health Foundation, 833 Butler Avenue, Doylestown, Pennsylvania 13901, on her behalf and on behalf of all others similarly situated,

Petitioner,

-against-

CASPAR WEINBERGER, individually and in his official capacity as Secretary of the United States Department of Health, Education and Welfare, 330 Independence Avenue, S.W., Washington, D.C. 20201,

Respondent.

----------x

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision

of the United States Court of Appeals for the District of Columbia rendered in the above entitled case on January 28, 1976. That decision affirmed the decision of the three-judge district court, for the District of Columbia, Judge Gerhard A. Gesell, rendered on November 22, 1974, which denied plaintiff's claims in all issues relating to Medicaid benefits for the mentally ill.

OPINION BELOW

The opinion of the Court of Appeals below (Appendix C, infra) is not as of yet reported. It was decided on January 28, 1976, under docket number 74-2103.

PASS

The opinion of the District Court below (Appendix B, infra) was not reported. It was decided on November 22, 1974, under docket number 74-961. They are found, respectively, as Appendices B and C.

JURISDICTION

The decision of the United States Court of Appeals was rendered on January 28, 1976. No request for an extension of time to file this petition has been made. Jurisdiction of this Court is invoked under Title 28, U.S. Code §1253.

QUESTIONS PRESENTED

When under Medicaid Law (42 U.S.C.

1396[a][16]) those people otherwise fully eligible for Medicaid benefits, who (1) are in the wrong age group (e.g., 21-65) and (2) are in an institution devoted entirely to healing either tuberculosis or mental illness, disqualified from <u>all</u> Medicaid benefits:

Does this denial constitute a violation of equal protection for a mental patient transferred from a hospital wing to a mental institution pursuant to doctor's orders who lost <u>all</u> her Medicaid benefits as a result?

Does this denial violate the patient's constitutional rights to association and travel?

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment.

Fourteenth Amendment.

FEDERAL STATUTES

42 U.S.C. 1396d (a)(17)(B)
(text in Appendix D)

STATEMENT OF CASE

The Petitioner, Sandra Kantrowitz, was originally denied her equal protection claim in the United States District Court for the District of Columbia by a three-judge district court, by order of Gerhard Gesell, on November 22, 1974. This order, appealed from, was affirmed by the United States Court of Appeals,

for the District of Columbia, on January 28, 1976.

The Petitioner is a 34-year-old New York State resident, who for the last eleven years has shown severe signs of mental illness. As a consequence, she has required hospitalization at various psychiatric facilities in New York State, over the past several years. She received various modes of treatment, none of which seemed to stem her continuing mental deterioration.

On August 11, 1974, petitioner Kantrowitz' physician admitted her to a non-profit private psychiatric institution, the Delaware Valley Mental Hospital Foundation, in Doylestown, Pennsylvania

(hereinafter "the Foundation") from Maimonides where she could have received Medicaid payments. It was felt by her physician that a change of environment and a separation from her family would have positive effects on her treatment.

Ms. Kantrowitz had applied for medical assistance and was approved as a recipient effective November 1, 1971 covering her stay at Maimonides. When she requested that the New York City Department of Social Services Agency pay for the cost of care and services received at the Foundation, her request was denied, after an administrative hearing on May 25, 1972. The request was denied because of the finding that, although the

Petitioner was in need of psychiatric care and eligible for medical assistance, and although the Foundation qualified as a reputable institution for the providing of such care, there could be no payment for the cost of her care at the Foundation by virtue of Federal Social Security Act 1905(a)(b), 42 U.S.C. §1396d(a)[1/], and the New York Social Services Law 366.1(c).

The Petitioner cannot afford to pay the cost of her medical care, in or out of an institution. She requires care that must be provided in an institutional

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1/ The District Court held that she could not represent tuberculosis patients denied benefits. Petitioner still urges that their position is logically and statutorily identical and identified.

setting, which is not available in a general hospital or other facility for which she could receive Medicaid payments.

REASONS FOR GRANTING THE WRIT

I. MEDICAID EXCLUSION IS VIOLATIVE OF EQUAL PROTECTION UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

A. Statute Involved and Classes Created

Under 42 U.S.C. §1396(a)(17)(B) persons who are under 65 years old and who are patients in institutions for tuberculosis or mental disease are specifically excluded from receiving Medicaid assistance.

Title XIX of the Social Security

Act, 42 U.S.C. §1396 et seq., created the Medical Assistance program, generally referred to as "Medicaid"; a needs program providing medical benefits for indigent and medically indigent persons. Medicaid makes vendor payments directly to medical professionals and institutions on behalf of needy persons who are aged, blind, disabled, or in families with dependent children. Medicaid provides, among other benefits, in-patient hospital and skilled nursing services in public and private general hospitals, as well as in-patient hospital services in institutions for mental diseases for persons under 21 or over 65. In fact, Medicaid covers services in any public or private institution

except, for those persons between 21 and 65 in institutions for mental disease and those persons under 65 in institutions for the care of tuberculosis.

Persons who would otherwise qualify for Medicaid assistance are denied funds solely on the basis of age and type of institution. 42 U.S.C. §1396(a)(16), enacted in 1973 (P.L. 92-603 §229B[a]), amended this exclusion by providing payment for in-patient psychiatric care for persons under 21. To date, otherwise Medicaid-eligible persons between the ages of 21 and 65 cannot receive assistance if they are in institutions for tuberculosis or mental disease which are devoted exclusively to such treatment.

The exclusion of these tubercular patients is just as arbitrary and capricious as the exclusion of the class of mentally ill patients. The arguments against the exclusion are parallel throughout. For the purposes of stylistic simplicity, Petitioner will normally refer in her Petition only to the class of mentally ill patients. This does not mean, however, that she agrees with the opinion that she does not properly represent the class of tubercular patients. Petitioner believes that she does adequately represent that class, and appeals the lower court's ruling to the contrary.

Provisions 1396d(a)(16) and (a)(17)(B) create two distinct classes of

persons for the purpose of medical assistance. These two classes are indistinguishable in their medical needs or financial status. They consist of: (A) poor persons in need of treatment who are (1) patients in mental disease institutions and are between the ages of 21 and 65, and (2) patients in tuberculosis institutions who are less than 65 years of age; (b) all other poor persons in need of treatment who are (1) patients in need of care for mental disease or tuberculosis and are within the included age categories, or (2) who are receiving treatment for either of these disorders in institutions not devoted exclusively to such treatment.

The purpose of the Medicaid

statute, 42 U.S.C. §1396 et seq., enacted in 1965 (P.L. 89-97), was to assist states in financing the medical care of their indigent residents. The range of services provided has been wide and flexible; the people serviced, illnesses treated and surroundings in which the aid has been extended have been varied. Within the statutory framework of protection, however, this one provision of the statute strikes a jarring and incongruous note as 42 U.S.C. §§1396(d)(A)(16), (17)(B) provide that except for in-patient psychiatric services for individuals under 21, medical assistance does not include payments with respect to care and services for any individual who has not attained

65 years and who is a patient in an institution for tuberculosis or mental illness.

B. The Exclusion Violates the Petitioner's Fundamental Rights and Is Not Supported By Any Compelling State Interest.

It is hard to conceive of any statutory scheme more crazy-quilt than this double hex of age and institution. In Petitioner's briefs to the courts below, she offered the historical explanation for this anomaly which she will again if certiorari is granted. But an explanation is not always a justification. If rationality of classification means anything, this classification is irrational. To describe the scheme is to

prove its unconstitutionality. The Fifth Amendment of the United States Constitution guarantees that a person should not be deprived of life, liberty, or property without due process of law. U.S. CONSTITUTION, AMENDMENT V. The due process clause of the Fifth Amendment applies the mandates of the equal protection clause of the Fourteenth Amendment to the actions of the U.S. Congress. United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 533 & n. 5 (1973).

Under the "traditional" test, a statutory classification must not be arbitrary and must bear some rational relationship to the purpose of the statute. E.g., Carrington v. Rash, 380 U.S. 89 (1965);

Williamson v. Lee Optical Co., 348 U.S. 483 (1955). Thus, while Congress was not obliged to create the program of medical assistance, once it does create such a program, it must do so in conformity to the precepts of the equal protection doctrine.

The rational basis test for measurement of statutory classifications under the equal protection clause was initially articulated by this Court in the early part of this century. In F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920), the Court observed:

> "The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced

shall be treated alike."

Since then, this Court has utilized this test and struck down several statutory provisions upon the ground that their classifications were arbitrary or irrelevant to the legislative purpose. McDonald v. Board of Elections Comm'rs of Chicago, 394 U.S. 802 (1969).

This Court in Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) said:

> "Whatever the ultimate parameter of the [Shapiro v. Thompson, 394 U.S. 618 (1969)] penalty analysis, it is at least clear that medical care is as much a basic necessity of life to an indigent as welfare assistance. And governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements. See, e.g., Shapiro, supra; Goldberg v. Kelly, 397

> U.S. 254, 264 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337, 340-342 (1969). It would be odd, indeed, to find that the State of Arizona was required to afford Evaro welfare assistance to keep him from the discomfort of inadequate housing or the pangs of hunger but could deny him the medical care necessary to relieve him from the wheezing and gasping for breath that attend his illness." 415 U.S. at 259.

Moreover, the exclusion violates the Petitioner's right to choose, in consultation with her physician, the most appropriate mode of medical care for her given condition, and is in violation of her right to privacy. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 195 (1973). The harm which Petitioner will suffer if she is forced to leave her present therapeutic care is certain and not at all speculative as the potential

harm discussed in Roe v. Wade.[2] The right of the individual to seek medical advice and treatment has been the foundation of this Court's decisions which have defined the right of privacy. Roe v. Wade, supra; Doe v. Bolton, supra; Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965). This right surely encompasses all decisions regarding alternative methods of care.[3] Since the Medicaid program will pay for some mental illness treatment for persons between 21-65, there

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2/ Many uncontroverted affidavits are in evidence on this point in the Court below.

3/ The right to refuse treatment against beliefs outside of life and death situations is clear. Winters v. Miller, 446 F.2d 65 (2d Cir. 1971).

must be a compelling interest shown for this age/institution/disease limitation. Fiscal considerations, the probable rationale, are not so compelling as to validate the exclusion. Shapiro, supra. Care for psychiatric patients in general hospitals is significantly higher than similar - or better - care in psychiatric hospitals.4/

4/ See the following statistics compiled by the American Hospital Association:

Total expenditures per patient day in:

federal psychiatric hospitals	$48.71
non-federal psychiatric hospitals	33.12
non-governmental, not-for-profit	85.50
investor owned	31.05

Instead, Petitioner is stuck between "the rock and the whirlpool." If she follows doctor's orders, she loses the right for any Medicaid treatment and imminently the prescribed treatment. If she moves out in order to get her Medicaid entitlement, her condition now being treated will rapidly worsen.

Petitioner suggests that medical treatment, which the Memorial Hospital decision defined as a basic necessity,

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4/ (continued)

state and local government operated	$31.05
community hospitals, i.e. short-term general and other special hospitals	$128.05

American Hosp. Assoc., Hospital Statistics 10-11 (1975).

requires strict scrutiny of any classification which prevents its receipt. The Court has emphasized that "when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny ..." Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1972). Where this Court has identified an interest as fundamental right or important personal consideration and recognized that it was inhibited by a statutory classification, it has required that the discrimination be justified by a compelling state interest. See, e.g., Jiminez v. Weinberger, 417 U.S. 628 (1974), Memorial Hospital v. Maricopa Co., supra; Dunn v. Blumstein,

405 U.S. 330 (1972); Stanley v. Illinois, 405 U.S. 645 (1972). This Court has consistently struck down such exclusions from governmental assistance programs, where the exclusion is based on an irrelevant secondary characteristic. E.g., Weinberger v. Weisenfeld, 420 U.S. 636 (1975); Jiminez v. Weinberger, supra; U.S. Department of Agriculture v. Moreno, supra; U.S. Department of Agriculture v. Murry, 413 U.S. 508 (1973); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973); and Memorial Hospital v. Maricopa County, supra, which involved medical assistance, as does the instant case. This classification cannot withstand any scrutiny at all.

In addition, the exclusion occurred as a consequence of exercising the constitutional right to travel, Shapiro v. Thompson, supra; U.S. v. Guest, 383 U.S. 745 (1966); to associate (in this case for therapeutic purposes), McLaughlin v. Florida, 379 U.S. 184 (1964); Lamont v. Postmaster General, 381 U.S. 301 (1965); to seek medical treatment, Memorial Hospital v. Maricopa County, supra. Yet, it has been repeatedly and emphatically held that it is unconstitutional to penalize for the past exercise of constitutional rights by denying statutory entitlements, Sherbert v. Verner, 374 U.S. 398 (1963); Shapiro v. Thompson, supra. So too, Petitioner's

valid, constitutionally protected choice to travel and associate to improve her medical condition should not be penalized by taking away all her Medicaid benefits.

II. THE DECISION IN LEGION DOES NOT CONTROL THE ISSUES IN THIS CASE

The lower courts did not explore the rationality of the challenged exclusions. It relied fully on Legion v. Richardson, 354 F.Supp. §456 (S.D.N.Y.), aff'd sub nom Legion v. Weinberger, 414 U.S. 1058 (1973), rehearing denied, 415 U.S. 939 (1974) as having established the rationality of challenges to Medicaid exclusions. The court's reliance on Legion was misplaced for two reasons:

(1) the issues presented in Legion are radically different from the ones presented here; (2) Legion was only summarily affirmed without opinion by the Supreme Court; therefore it should have little precedential effect in this case.

Legion was self-described as a general broadside attack on the total administration of the Medical Assistance statutes in order to produce a billion and a half dollars on behalf of patients in public hospitals.5/ The suit, as the defendants pointed out, was about the "budgetary relationships between the

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5/ The complaint referred to one million patients who should get one billion and a half dollars to improve the usually inadequate care.

federal and state governments, etc."

In addition to the monetary relief sought, Legion plaintiffs also sought to declare Titles XVIII and XIX unconstitutional. The plaintiffs carried fictitious names to suggest the vast range of the class: Legion, Armies, Hosts. The narrow class confronted with this case's anomaly was not described nor the deprivation detailed in the complaint nor dealt with in any briefs or decision.

The plaintiffs in Legion included persons who were both eligible and ineligible for Medicaid. Here Petitioner is only ineligible for Medicaid by virtue of the challenged statutory exclusion. At issue here is a narrow equal protection

claim made in behalf of a specific class of persons suffering from mental illness or tuberculosis who would be eligible for Medicaid assistance but for their age and type of institution in which they receive care. In Legion two of the three patients definitely would not have been excluded from eligibility for Medicaid benefits by virtue of the provisions challenged here. (Only one of the three might have been affected by the exclusion.)

The nature of the only equal protection argument addressed to the court in Legion is not clear. The Legion court seemed to be seeking a rational justification for the distinction "between medically indigent persons who require short-term

care and those who require long-term care ...", 354 F.Supp. at 459. The distinction created by 1396d(a)(17)(B) is based on age and institution rather than length of care. In fact, length of care is irrelevant, since a long-term patient in a non-mental disease institution is fully covered by Medicaid, while a short-term patient in a mental hospital receives no coverage. Additionally, while Legion was brought by and on behalf of patients in state institutions to establish that they were, as patients in state hospitals, victims of discrimination, this case is brought by a patient in a private mental institution. To allow the exclusion, herein challenged, to remain on the basis

of Legion which is so out of step with the case at bar, is totally irrational and grossly prejudices the rights of Petitioner and others similarly situated.

Other courts have recognized the irrationality of this challenged classification and implicitly the irrelevance of Legion. Montoroula v. Parry, 373 N.Y.S. 980 (1975) held that the New York statute implementing this federally mandated classification denied equal protection, was "without basis ... inherently unreasonable ... arbitrary ... (with) no rational basis." Petitioner agrees.

See for an analogous analysis Morales v. Minter, 393 F.Supp. 88 (D. Mass. 1975) striking down the exclusion of those not

between 18 and 65 from general relief pending other entitlements. Petitioners agree and urge the same result for the opposite discrimination (compounded further by institution and disease).

Furthermore, at the time of Legion all mentally ill persons under 65 years of age in psychiatric institutions were excluded from benefits. Since then, persons under 21 have been made eligible for benefits. As the exclusion becomes more specific, it becomes more and more arbitrary and irrational, and, consequently, unconstitutional.

Even if Legion were not distinguishable, it is not controlling. The summary affirmance there is not binding.

Summary dispositions, although technically on the merits, are often in practice only "the circumstantial equivalent of a denial of certiorari", Serrano v. Priest, 5 Cal. 3rd 584, 96 Cal. Reporter, 601, 624; 487 P.2d 1241 (1971). In Rothstein v. Wyman, 476 F.2d 226 (2d Cir. 1972), cert. denied 411 U.S. 921, 93 S.Ct. 1552, 36 L.Ed. 2d 315 (1973), the court refused to regard as binding summary affirmances by the Supreme Court of previous three-judge decisions ordering the judgment of retroactive public assistance benefits by states. In Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 668 (1974) Justice Rehnquist, speaking for the Court, reversed Jordan v. Weaver,

472 F.2d 985 (7th Cir. 1973), in part, on the question of retroactive benefits thereby overruling several three-judge courts whose opinions this Court had previously summarily affirmed.

The misplaced reliance on Legion used to justify this discrimination underscores the necessity of granting certiorari so that the court may examine this error and place the question in proper constitutional perspective.

CONCLUSION

Since 42 U.S.C. §1396d(a)(17)(B) is repugnant to the basic principle of equal protection under the Due Process Clause of the Fifth Amendment, a writ of

<u>certiorari</u> should issue to review the judgment and opinion of the U.S. District Court of Appeals for the District of Columbia.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SANDRA KANTROWITZ, Delaware Valley Mental Health Foundation, 833 Butler Avenue, Doylestown, Pennsylvania 18901, on her own behalf and on behalf of all others similarly situated, and

AMERICAN PUBLIC HEALTH ASSOCIATION, INC., 1015 18th Street, N.W. Washington, D.C. 20036,

Plaintiffs,

v.

CASPAR WEINBERGER, individually and in his official capacity as Secretary of the United States Department of Health, Education and Welfare, 330 Independence Avenue, S.W., Washington, D.C. 20201,

Defendant.

COMPLAINT
(FOR DECLARATORY AND INJUNCTIVE RELIEF AND FOR COMPENSATORY DAMAGES)

I.

PRELIMINARY STATEMENT

1. The plaintiffs in this class action ask this Court to enjoin the enforcement of a portion of the federal Medicaid statute, 42 U.S.C. §1396d(a)(17)(B), which denies payment for care or services to persons between the ages of 21 and 65 who are patients in institutions for mental diseases and all persons under 65 years of age who are patients in institutions for tuberculosis. The statute is challenged as invalid on the grounds that it is a denial of equal protection and due process under the Due Process Clause of the Fifth Amendment.

II.

JURISDICTION

2. Jurisdiction is conferred on

this Court by 28 U.S.C. §1361, which provides for original jurisdiction of this Court in any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to plaintiffs. Jurisdiction also is conferred on this Court by 28 U.S.C. §1331. This is a civil action arising under the Constitution and laws of the United States and the matter in controversy exceeds the sum or value of $10,000, exclusive of interest or costs. Plaintiffs' claim for a declaration of rights is authorized by the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202, and by Rule 57 of the Federal Rules of Civil Procedure.

3. This is a proper case for determination by a three-judge court, pursuant to 28 U.S.C. §§2282 and 2284, because plaintiffs seek an injunction to restrain defendant Weinberger, who is a federal officer, from the enforcement, execution and operation of an exclusion to a federal statute of national applicability, to wit, 42 U.S.C. §1396d(a)(17)(B), which denies to certain persons medical assistance payments for care and services received in institutions for mental diseases or tuberculosis, on the ground that said statute violates the Constitution of the United States.

III.

PLAINTIFFS

4. Plaintiff Sandra Kantrowitz, who was domiciled at 5502 14th Street, Brooklyn, New York, and is currently in residence at the Delaware Valley Mental Health Foundation, 833 Butler Avenue, Doylestown, Pennsylvania, is a citizen of the United States and the state and city of New York. Plaintiff was a recipient of Medicaid under the Medical Assistance for Needy Persons program (case #5103937 1) until April 30, 1972. (A copy of plaintiff's Medicaid card is appended to the complaint as Exhibit A.)

5. Plaintiff American Public Health Association, Inc. (APHA) is an organization incorporated in Massachusetts, with headquarters in Washington, D.C.

APHA's membership comprises 26,000 public health professionals and includes an additional 26,000 public health workers and leaders who are members of affiliated organizations. APHA is organized into various sections, one of which, the Mental Health Section, includes 1,300 members whose disciplines encompass psychiatry, psychology, mental health aid and administration. A number of these mental health professionals and workers within APHA are responsible for the treatment of persons such as the individual plaintiff, who is a patient in a mental health institution.

6. For 101 years, APHA has advocated protection of the public health on

behalf of those who are committed by employment, volunteer interest and public mandate to this goal. It is APHA's policy that access to and opportunity for health care is a fundamental human right, not to be abridged because of race, sex, age, economic status or disease condition. The denial of Medicaid reimbursement for patients such as the individual plaintiff restricts the available resources which can be devoted to the health care of such patients, thereby injuring APHA and its members in the pursuit of their professional goals and practice.

IV.

CLASS ACTION ALLEGATIONS

7. The individual plaintiff

brings this action on her own behalf and, pursuant to Rule 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all persons similarly situated. The members of the class are all persons eligible for medical assistance who are between 21 and 65 years of age and are patients in institutions for mental disease and all persons eligible for medical assistance who are less than 65 years of age and are patients in institutions for tuberculosis, and whose care in either the mental disease or tuberculosis institutions is not paid for under the Medicaid program. The requirements of Rule 23 are met by reason of all of the following:

(a) The class is so numerous that joinder of all members is impracticable. Although discovery will be necessary to ascertain with precision the size of the class, plaintiffs believe that the class is so numerous as to satisfy this requirement.

(b) There are questions of law and fact common to the class. The question of the constitutionality of 42 U.S.C. §1396d(a)(17)(B) is common to the class.

(c) The claims of the named individual plaintiff are typical of the claims of the class. The representative party is being denied Medicaid benefits to which she is entitled because of her age and status as a patient in an

institution for mental diseases or tuberculosis. Her claim to the statutory entitlements has the same basis in law as that of the class she seeks to represent.

(d) The representative party will fairly and adequately protect the interests of the class. The plaintiff's interests are co-extensive with, and not antagonistic to, those of the class she seeks to represent. Plaintiff's attorneys are competent and experienced in this type of litigation.

(e) The requirement of Rule 23(b)(2) is met; the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief

and corresponding declaratory relief appropriate with respect to the class as a whole. The defendant has failed or refused to accord to the named individual plaintiff and the class she seeks to represent the statutory entitlements under the federal Medicaid program.

V.

DEFENDANT

8. Defendant Caspar Weinberger is the Secretary of the United States Department of Health, Education and Welfare, and as such is charged under the statutes of the United States with the administration of 42 U.S.C. 1396d(a)(17)(B), which is challenged herein as a violation of the Constitution of the United

States.

VI.

FACTUAL ALLEGATIONS

9. The individual named plaintiff, Sandra Kantrowitz, is a 34-year-old, unmarried woman, who entered the Delaware Valley Mental Health Foundation, Doylestown, Pennsylvania ("the Foundation") as an in-patient in August 1971. The Foundation is an in-patient, non-profit facility specifically licensed in Pennsylvania to provide services for the mentally ill.

10. Plaintiff Kantrowitz subsequently applied for medical assistance and was approved as a recipient, effective November 1971. Plaintiff Kantrowitz requested that the New York City Department

of Social Services ("Agency") pay for cost of care and services received from the Foundation. The Agency denied her request.

11. Plaintiff Kantrowitz requested a "fair" hearing by the New York State Department of Social Services ("Department") to review the Agency's determination, and a hearing was held on April 7, 1972. The hearing was attended by plaintiff Kantrowitz's mother and witnesses, by a representative for the Commissioner of the Agency, and by a state review officer.

12. Testimony and documentary evidence were taken from plaintiff Kantrowitz's witnesses as to the necessity of

the treatment given to her, the qualifications of the staff of the Foundation, and the credentials of the Foundation itself.

13. The Department issued a decision after the fair hearing, dated May 25, 1972, which affirmed the determination of the Agency.

14. In a written opinion, which is attached hereto as Exhibit B, the review officer made the following findings of fact, which were substantially as plaintiff Kantrowitz had presented them:

(a) The plaintiff has suffered from a mental disorder for the past eight years and entered the Foundation on

August 11, 1971, on the recommendation of Maimonides Medical Center of New York City and Brooklyn State Hospital;

(b) The Foundation is a non-profit facility licensed in Pennsylvania for the purpose of permitting in-patient care for the mentally ill;

(c) The plaintiff has been treated, living the past eight years in various New York State facilities for the mentally disabled, but expert testimony stated that under such treatment,

plaintiff's condition had deteriorated, and that only the type of treatment offered at the Foundation could produce a favorable prognosis for improvement of plaintiff's condition.

The review officer also found that the plaintiff was eligible for medical assistance, but that the request for payment of the cost of her care at the Foundation must be denied on the ground that the Agency cannot pay for the care of a 30-year-old person in a facility providing services for the mentally disabled which is not a part of a general or chronic disease hospital, citing the Federal

Social Security Act §1905(a), (b) [42 U.S.C. §1396d(a),(b)], and New York Social Services Law §366.1(c), which excludes from coverage persons who would be ineligible under applicable federal law.

15. The Agency has terminated plaintiff's medical assistance.

16. The denial of the payments for the cost of plaintiff Kantrowitz's care at the Foundation and the termination of her assistance has caused plaintiff great hardship in that she has no source of income and no means to pay for the cost of her treatment at the Foundation and, as a result, may be required to leave said facility, resulting in a

grave deterioration of her health and danger to her life.

VII.

17. Under 42 U.S.C. §1396d(a)(17)(B), medical assistance is defined to exclude payment for care or services for any individual who is less than 65 years of age and a patient in an institution for tuberculosis or mental diseases (except that 42 U.S.C. §1396d(a)(16) allows payments for in-patient psychiatric hospital services for individuals under age 21).

18. The provisions of 42 U.S.C. §1396d(a)(17)(B) thereby create two classes of persons for the purpose of medical assistance:

(A) Poor persons in need of treatment who are (1) between the ages of 21 and 65 and patients in institutions for mental diseases and (2) less than 65 years of age and patients in institutions for tuberculosis, and

(B) All other poor persons in need of treatment for tuberculosis or mental disease who are patients in any institution.

19. The two classes of recipients should be indistinguishable, and the creation of the two classes frustrates, rather than furthers, the purposes of the Medicaid program, to wit, to rehabilitate and provide other services to help eligible families and individuals attain or retain

capacity for independence or self-care. 42 U.S.C. §1396. Nonetheless, under the provisions of the statute challenged herein, only those persons in category (B) above would have their treatment paid for under the Medicaid program.

20. 42 U.S.C. §1396d(a)(17)(B) thereby arbitrarily discriminates against poor persons between 21 and 65 who are in institutions for mental diseases and persons less than 65 years of age in institutions for tuberculosis, by denying them payment for care and services necessary for their mental disease or tuberculosis.

21. The classification to exclude payment for treatment of patients between the ages of 21 and 65 in institutions for

tuberculosis is arbitrary, irrational, and unrelated to the purposes of the Medicaid program. Said classification is a violation of equal protection under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

VIII.

22. Plaintiff Kantrowitz and members of her class have suffered, do suffer and will continue to suffer grievous and irreparable injury by reason of defendant's application and enforcement of the illegal and unconstitutional statute challenged herein. Plaintiff Kantrowitz has no adequate remedy at law. Plaintiff Kantrowitz has exhausted her

administrative remedies.

IX.

WHEREFORE, plaintiffs respectfully pray, on their own behalf and on behalf of all those similarly situated, that this Court:

(1) Assume jurisdiction of this cause, convene a three-judge Court, pursuant to 28 U.S.C. §§ 2282 and 2284, to determine this controversy, and set this case down promptly for a hearing on the motion for preliminary injunction.

(2) Determine by order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action.

(3) Pending a hearing and deter-

mination by the three-judge court, grant a temporary restraining order, pursuant to 28 U.S.C. §2284(3) restraining defendant, his successors in office, agents and employees, and all other persons in active concert and participation with them, from continuing to cause irreparable harm to plaintiff Kantrowitz and her class by refusing to pay for the care and services received by them in institutions for mental diseases or tuberculosis, in the amount to which they are entitled and would otherwise be available to them, except for the fact that they are not at least 65 years old (or under 21 in the case of mental patients) and are patients in institutions for mental diseases or

tuberculosis.

Plaintiffs further pray that the three-judge court:

(4) Enter preliminary and permanent injunctions, pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining defendant, his successors in office, agents and employees, and all other persons in active concert and participation with them, from refusing to grant to plaintiff and all persons similarly situated Medicaid benefits in the amount to which they are otherwise entitled solely on the grounds that they are not at least 65 years of age (or, in the case of mental patients, under 21) and are patients in an institution for

tuberculosis or mental diseases, and ordering said defendant to pay for the care and treatment of plaintiff and all other persons similarly situated which was received in such institutions since each of them was admitted while a recipient of Medicaid and to reimburse them for past payments wrongfully denied.

(5) Enter a final judgment, pursuant to 28 U.S.C. §§2201 and 2202 and Rules 54, 57 and 58 of the Federal Rules of Civil Procedure, declaring that 42 U.S.C. §1396d(a)(17)(B) is invalid on the ground that it is violative of equal protection under the Due Process Clause of the Fifth Amendment to the United States Constitution.

Plaintiff respectfully prays on her own behalf that this Court:

(6) Pending the hearing and determination by the three-judge court, grant a temporary restraining order, pursuant to 28 U.S.C. §2284(3) restraining defendant Weinberger, his successors in office, agents and employees, and all other persons in active concert and participation with them, from continuing to cause irreparable harm to plaintiff by refusing to grant plaintiff medical assistance pursuant to the challenged section of the federal Medicaid statute, 42 U.S.C. §1396d(a)(17)(B).

(7) Enter a final judgment restoring plaintiff's medical assistance

as of May 1, 1972.

(8) Allow plaintiff her costs herein, pursuant to Rule 54(d) of the Federal Rules of Civil Procedure.

(9) Grant to plaintiffs and to all other persons similarly situated, such other and further relief, including but not limited to payment of all monies wrongfully withheld and reasonable attorneys' fees, as may be just, proper and equitable.

Respectfully submitted,

/s/ Jonathan A. Weiss/fwk

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Exhibit A

A-29

(DRH DSS-495-A (5/70)

MEDICAL IDENTIFICATION CARD

KANTROWITZ /S 995-2
5502 14 AVE
BROOKLYN, NY 11219

EF 11/01/71 T/A MA-AD

Period	Case Number	Coverage: Adults	Coverage: Children
TO 04/30/72	5103937 1	B-1	NONE

FOLD HERE
DO NOT DETACH

REMOVE CARD
ALONG PERFORATIONS

SIGNATURE
NYC-5

Maximum Cost To Recipient	Amount $ 144.	Health Ins.	Yes	No

NEW YORK STATE
DEPARTMENT OF SOCIAL SERVICES

In the Matter of the Appeal of SANDRA KANTROWITZ from a determination by the New York Department of Social Services (hereinafter called the agency)	DECISION AFTER FAIR HEARING

A fair hearing was held at 95 Rockwell Place, Brooklyn, New York, New York, on April 7, 1972, before Paul Harrington, Hearing Officer, at which the appellant's representatives and representatives of the agency appeared. The appeal is from a determination by the agency relating to the adequacy of medical assistance in that the agency denied the appellant's request for payment of

the cost of her care in an institution primarily for the treatment of the mentally disabled. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

(1) The appellant who has suffered from a mental disorder for the last eight years entered the Delaware Valley Health Foundation in Pennsylvania on August 11, 1971 on the recommendation of the Maimoinides Medical Center of New York City.

(2) The Delaware Valley Mental Health Foundation is a non-profit facility licensed in the State of Pennsylvania

for the purpose of providing in-patient services for the mentally ill.

(3) The appellant has over the past eight years received treatment for her condition in various facilities for the mentally disabled in New York State. In the opinion of the resident doctor in psychiatry in Maimoinides Medical Center, the treatment which the appellant has received in New York State in the various facilities for the mentally disabled had not improved her condition and in fact her condition had progressively deteriorated. Further, in this doctor's opinion, the new approach to treatment of mentally disabled persons offered by the Delaware Valley Mental Health Foundation

was the only type of treatment where the prognosis for improvement in the appellant's condition was good.

(3) Although the appellant is eligible for medical assistance, the agency denied the request for payment of the cost of her care in the Delaware Valley Mental Health Foundation on the grounds that it could not pay for the care of a 30 year old person in a facility providing services for the mentally disabled which is not a part of a general or chronic disease hospital.

Section 366.1(c) of the Social Services Law of New York provides that medical assistance shall be given under this title to persons eligible therefore

who require such assistance and who:

> "is not an inmate or patient in an institution or facility wherein medical assistance for needy persons may not be provided in accordance with applicable federal or state requirements;***"

Section 1905. of the Federal Social Security Act as amended effective January 2, 1968 provides in part as follows:

> "Section 1905. For purposes of this title--
> (a) The term "medical assistance" means payment of part or all of the following care and services*** except that such term does not include--
> *** (b) any such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for tuberculosis or mental disease."

Therefore, inasmuch as the appellant has not attained 65 years of age and is receiving care and services in an

institution for mental diseases which is not part of a general hospital, the agency cannot pay for the cost of such care and services under the Medical Assistance for Needy Persons program pursuant to the above quoted provisions of the Social Services Law of New York State and the Federal Social Security Act.

No determination is made herein in regard to any benefits that the appellant might be entitled to under the Mental Hygiene Law of the State of New York.

DECISION: The determination of the agency is affirmed.

DATED: Albany, New York
MAY 25 1972

/s/ Edward McMahin
FIRST DEPUTY COMMISSIONER

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

SANDRA KANTROWITZ, etc. and AMERICAN PUBLIC HEALTH ASSOCIATION, INC., Plaintiffs, v. CASPAR WEINBERGER, Defendant.	Civil Action No. 74-961

Before TAMM, Circuit Judge; SMITH, District Judge; GESELL, District Judge.

OPINION AND ORDER

GESELL, District Judge: This is an individual and class action in the nature of mandamus and for declaratory judgment seeking to restrain the Secretary

of Health, Education and Welfare from enforcing the provisions of the Social Security Act which, as will be developed later, prohibit federal payment for care or services to persons between the ages of 21 and 65 who are patients in institutions for mental disease.*/ It is claimed that by reason of this statutory hiatus plaintiff Kantrowitz and others are denied due process and equal protection under the

---

*/ All persons under 65 years of age who are patients in tubercular institutions are also denied Medicaid benefits. Plaintiffs sought to challenge this provision as well but they lack standing to sue. Kantrowitz herself does not suffer from tuberculosis and does not represent the class. Moreover, there was no proof establishing that anyone suffering from tuberculosis had pursued administrative remedies or met the requisite jurisdictional amount.

Fifth Amendment to the Constitution.

Kantrowitz, age 34, is a patient in a non-profit institution for mental diseases licensed by the State of Pennsylvania. She requested Medicaid payment to cover cost of her institutional care but has been administratively denied such benefits on the ground that while she is mentally ill, and has been for some time, she is not entitled to Medicaid assistance by reason of her age. As a result of this ruling, Kantrowitz may be required to leave the institution against her will, in spite of her strong need for continued institutional care. Family funds to provide such care are apparently not available.

At the outset, defendant challenges the jurisdiction of the Court, asserting that the claims of the class are separate and distinct and may not be aggregated and that there has been a failure to establish a jurisdictional amount by the individual named plaintiff. The Court declines to certify the class for the reasons asserted but is satisfied that Kantrowitz has established jurisdiction in the amount of more than $10,000 to afford jurisdiction under 28 U.S.C. § 1331 for her personal claim based on denial of Medicaid assistance. Accordingly, the Court turns to the merits. The issues have been fully briefed and argued on cross-motions for summary

judgment and there are no material issues of fact in dispute.

Section 1396d(a)(17)(B) of 42 U.S.C., enacted in 1965 as § 1905(a)(15)(B) of Pub. L. 89-97, 79 Stat. 352, defined "medical assistance" so as to exclude Medicaid payments on behalf of individuals under age 65 who were receiving in-patient care in institutions solely for the treatment of mental disease or tuberculosis. This exclusion based on institutional status and type of disease was challenged on equal protection grounds before the three-judge court in Legion v. Richardson, 354 F. Supp. 456 (S.D.N.Y.), aff'd sub nom. Legion v. Weinberger, 414 U.S. 1058 (1973), rehearing denied, 415 U.S. 939 (1974).

The court upheld the exclusion as rational on the grounds that Congress had determined that patients in these institutions had historically been the responsibility of the states and should remain so, see Legion, supra, 354 F. Supp. at 459; see also, U.S. Code Cong. & Admin. News 2086 (1965). Its decision is, of course, binding on us.

What was not before the court in Legion, supra, and the primary issue tendered in this proceeding is the exclusion of potential recipients on the basis of their age. Section 1396d(a)(16) of 42 U.S.C., added in 1972 by § 229B of Pub. L. 92-603, 86 Stat. 1460, authorized Medicaid payments on behalf of persons

under 21 who were financially qualified and were receiving in-patient care in psychiatric hospitals, provided such treatment was certified by a team of physicians as reasonably likely to "improve the condition . . . to the extent that eventually such services will no longer be necessary." 42 U.S.C. § 1396d (h)(1)(B)(ii). Plaintiff argues the effect of this amendment is to make all needy persons eligible for Medicaid assistance for in-patient care in mental institutions unless they are between the ages of 21 and 65, and that such a classification on the basis of age is irrational and denies equal protection. Cf. Cleveland Bd. of Education v. LaFleur, 414

U.S. 632, 657 (1974) (Rehnquist, J. dissenting).

The legislative history of the challenged provisions throws light on the congressional purpose and is essential background for the ultimate decision in this case. Pub. L. 92-603 was a major revision of the Social Security Act which received searching attention because, among other things, it initially included the Nixon Administration's Family Assistance Plan. The bill (H.R. 1) as approved in the House did not contain the provisions adding funding for "Medicaid Coverage for Mentally Ill Children." These provisions were added to the bill by the Senate Finance Committee through Amendment

No. 549 which was accepted by the full Senate without debate. See 118 Cong. Record 32472, 32477 (Sept. 27, 1972).

The Senate Finance Committee Report advanced the following significant explanation for the amendment:

> Under present medicaid law, reimbursement for inpatient care of individuals in institutions for mental disease is limited to those otherwise eligible individuals who are 65 years of age or older.
>
> Matching for outpatient care for mentally ill children, as well as needy adults, is currently available under Title XIX. The committee supports use of these funds where appropriate and believes that outpatient treatment in the patient's own community should be used wherever possible. However, in some cases, inpatient care in an institution for mental diseases is necessary.
>
> The committee amendment would therefore authorize Federal matching under medicaid for eligible children, age 21 or under, receiving active care and treatment for mental diseases in an accredited medical institution. . . .

> The committee amendment would therefore authorize Federal matching under medicaid for eligible children, age 21 or under, receiving active care and treatment for mental diseases in an accredited medical institution.
> . . .
>
> The committee believes that the nation cannot make a more compassionate or better investment in medicaid than this effort to restore mentally ill children to a point where they may very well be capable of rejoining and contributing to society as active and constructive citizens.
>
> The committee also believes that the potential social and economic benefits of extending medicaid inpatient mental hospital coverage to mentally ill persons between the ages of 21 and 65 deserves to be evaluated and has therefore authorized demonstration projects for this purpose.
>
> S. Rep. No. 1230, 92d Cong., 2d Sess. 280-1 (1972).

The legislative history of Pub. L. 92-603 provides only limited explanation of why Congress singled out persons under 21 to receive benefits but continued to exclude those age 22-65 from payments for

in-patient care in mental hospitals. In Conference, the House accepted the Senate amendment to provide payments for mentally ill persons under 21, and the requirement, which became part of 42 U.S.C. § 1396d(h)(1)(B), that an independent medical review team must first certify that benefits be used for care that can be expected to lead to improvement and eventual discharge was added. The Conference, without explanation, also struck out the provisions for demonstration projects for those between 21 and 65. H.R. Rep. No. 1605, 92d Cong., 2d. Sess. 65 (1972) (Conference).

Subsequently, H.E.W. provided estimates that the cost of adding care for mentally ill children would be

$40 million in fiscal 1973 and $110 million in fiscal 1974, or $104 million in calendar year 1973 and $120 million in calendar year 1974. 118 Cong. Record 37354 (Oct. 18, 1972).

With this legislative history in mind, the Court considers the controlling precedents. Legion v. Richardson, supra, states the controlling rule of law to be applied under circumstances such as presented here where a public welfare legislative classification is challenged. The Court there commented:

> Where a statutory classification is not conceived on peculiarly suspect grounds such as wealth or race, all that is constitutionally required is that the challenged classification or restriction bear a reasonable relationship with the objectives sought to be fulfilled by the legislation. See, e.g., McDonald v. Board of

> Elections Comr's of Chicago, 394 U.S. 802, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969). In the area of economics and social welfare the Supreme Court has established that "a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." Dandridge v. Williams, 397 U.S. 471, 485, 90 S. Ct. 1153, 1161, 25 L. Ed. 2d 491 (1970).
>
> 354 F. Supp. at 459.

Moreover, there is related authority to the effect that equal protection is not denied when a legislature in dealing with a social problem chooses to take "one step at a time," Williams v. Lee Optical Co., 348 U.S. 483, 489 (1955), "so long as the line drawn" between steps is "rationally supportable." Geduldig v. Aiello, 94 S. Ct. 2485, 2491 (1974).

The validity of certain age classifications has been recognized in

a closely related context. In Jefferson v. Hackney, 406 U.S. 535 (1972), the Court was faced with a statute which, inter alia, preferred the elderly and disabled poor over other welfare recipients by awarding them 100 percent of their budgeted needs while giving only 75 percent of budgeted need to other categories of recipients. The statute was held not to violate the equal protection clause. The Court stated, "the State may have concluded that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living," 406 U.S. at 549, and consequently it was permissible to give preference to those groups by

meeting their needs first.

In selecting persons under age 21 as the next step in its grant of funds for mental illness, Congress drew the traditional line of emancipation from parental control. There is no showing that this age differentiation was, on its face, unreasonable. Congress was obviously concerned with the enormous expense any program to supplement traditional state aid for mental illness involved. It chose to make a compassionate, sound investment to restore mentally ill children amenable to treatment to constructive citizenship. The 1972 provisions affording in-patient service for mental disease to persons under 21, here attacked,

should not be viewed as an exclusion of other groups, but rather a rational step toward broadening the class of persons receiving federal benefits. Where the Federal Government acts to assist and supplement traditional state care for those requiring medical assistance who are in impoverished circumstances, it cannot be said that there is, on the face of things, a constitutional infirmity in a decision to move gradually into the area providing institutional support initially for a dependent group. Institutional care is now provided to both extremes of the age spectrum. No differentiation is made on racial or other purely arbitrary grounds. Nor does any

constitutional issue arise, as plaintiffs contend, because of the very indirect and speculative effect the program may have upon a person's travel or choice of residence when reaching age 21.

The Court is persuaded that this positive step is wholly consistent with the obvious legislative intent to broaden Medicaid assistance and anticipates that Congress will continue to consider and study approaches designed to improve mental care assistance to others presently not receiving institutional assistance. The rationality test reiterated in Legion for public welfare legislation has been satisfied in this instance. The complaint based on denial of equal protection to

those seeking Medicaid assistance for institutional care of mental disease between ages 21 and 65 must fail.

Summary judgment is granted for defendant and denied as to plaintiffs on all issues relating to Medicaid benefits for the mentally ill. The claims on behalf of tubercular patients are dismissed for lack of jurisdiction.

Since there has been no allegation that defendants would refuse to obey a declaratory judgment of this Court, injunctive relief would, in any event, be inappropriate. Therefore, any appeal from this Order will properly lie to the United States Court of Appeals for the District of Columbia Circuit. See

Gerstein v. Coe, 94 S. Ct. 2246 (1974);

Poe v. Gerstein, 94 S. Ct. 2247 (1974).

The foregoing shall constitute the Court's findings of fact and conclusions of law.

SO ORDERED.

/s/ Edward Allen Tamm
United States Circuit Judge

/s/ James Lewis Smith, Jr.
United States District Judge

/s/ Gabriel A. Gesell
United States District Judge

November 22, 1974.

APPENDIX C

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-2103

SANDRA KANTROWITZ, APPELLANT
AMERICAN PUBLIC HEALTH ASSOCIATION, INC.

v.

CASPAR WEINBERGER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action 74-961)

Argued November 20, 1975

Decided January 28, 1976

Jonathan A. Weiss, with whom *Patricia Butler* was on the brief for appellants. *Florence W. Roisman*, also entered an appearance for appellants.

Robert E. Hauberg, Jr., Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, *John A. Terry*, *Stuart M. Gerson* and *Robert M. Werdig, Jr.*, Assistant United States Attorneys, were on the brief for appellee.

Before: DANAHER, *Senior Circuit Judge*, WILKEY, *Circuit Judge* and VAN PELT,* *United States Senior District Judge* for the District of Nebraska

PER CURIAM: Having found that the issues had been fully briefed and argued on cross-motions for summary judgment and that there were no material issues of fact in dispute, a three-judge court [1] entered judgment for the appellee. American Public Health Association, Inc., co-plaintiff in the district court, has not appealed. The complaint had alleged, as presently pertinent,[2] that 42 U.S.C. § 1396d(a)(17)(B) is invalid as denying equal protection and due process in its proscription of payments with respect to care or services to persons between the ages of 21 and 65 who are patients in institutions for mental diseases.

The present appellant for several years had been suffering from a severe mental disorder and had undergone treatment in New York institutions. Her New York physician recommended that she become, and she was accepted as, a patient in a *private* non-profit mental hospital, the Delaware Valley Mental Hospital Foundation, in Doylestown, Pennsylvania. New York City and State agencies had declined to pay [3] for her institutional care in the facilities of the *private* Foundation.

---

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] The members of the court were Circuit Judge Tamm and District Judges Smith and Gesell.

[2] The claims on behalf of tubercular patients were dismissed for lack of jurisdiction.

[3] The New York ruling was that the Pennsylvania facility is not part of a general or chronic disease hospital, *see* 42 U.S.C. § 1396d(a), (b). *Compare Legion v. Richardson*, 354 F. Supp. 456 (S.D.N.Y.) and discussion in the opinion of the three-judge court at 458; *aff'd sub nom, Legion v. Weinberger*, 414 U.S. 1058 (1973), *rehearing denied*, 415 U.S. 939 (1974).

Aged 34 when this action was brought, she was within the exclusion of Federal payment for care and services for one who is less than 65 years of age and a patient in an institution for mental diseases.[4]

Such was the background from which emerged the appellant's claims before the three-judge court.

We have carefully considered the record, the helpful briefs of respective counsel, and the opinion of Judge Gesell writing for the three-judge court in *Kantrowitz v. Weinberger*, 388 F. Supp. 1127 (D.D.C. 1974). The reasoning there and the conclusions reached by the three-judge court have persuaded us that we must affirm on that opinion.

Judgment accordingly.

---

[4] *See* 42 U.S.C. § 1396d(a)(16) as to in-patient psychiatric hospital services for individuals under age 21.

APPENDIX D

§ 1396d. Definitions—Medical assistance

For purposes of this subchapter—

(a) The term "medical assistance" means payment of part or all of the cost of the following care and services (if provided in or after the third month before the month in which the recipient makes application for assistance) for individuals, and, with respect to physicians' or dentists' services, at the option of the State, to individuals (other than individuals with respect to whom there is being paid, or who are eligible, or would be eligible if they were not in a medical institution, to have paid with respect to them a State supplementary payment and are eligible for medical assistance equal in amount, duration, and scope to the medical assistance made available to individuals described in section 1396a(a)(10)(A) of this title) not receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV, and with respect to whom supplemental security income benefits are not being paid under subchapter XVI of this chapter, who are—

(17) any other medical care, and any other type of remedial care recognized under State law, specified by the Secretary;

except as otherwise provided in paragraph (16), such term does not include—

(A) any such payments with respect to care or services for any individual who is an inmate of a public institution (except as a patient in a medical institution); or

(B) any such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for tuberculosis or mental diseases.

No. 75-1522

In the Supreme Court of the United States

OCTOBER TERM, 1975

SANDRA KANTROWITZ, PETITIONER

v.

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

REX E. LEE,
Assistant Attorney General,

WILLIAM KANTER,
DAVID M. COHEN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1522

SANDRA KANTROWITZ, PETITIONER

v.

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-55 to A-57) is not yet reported. The opinion of the three-judge district court (Pet. App. A-36 to A-54) is reported at 388 F. Supp. 1127.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1976. The petition for a writ of certiorari was filed on April 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

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[1]Petitioner erroneously invokes this Court's jurisdiction under 28 U.S.C. 1253. See note 5, *infra*.

QUESTION PRESENTED

Whether Title XIX of the Social Security Act invidiously discriminates on the basis of age by denying the states reimbursement, under the federal Medicaid program, for expenditures for inpatient medical services received by individuals over 20, but under 65, years of age in institutions for mental diseases.

STATUTORY PROVISIONS INVOLVED

With the exceptions noted below, the relevant statutory provisions are set forth at Pet. App. A-58.

42 U.S.C. (Supp. IV) 1396d(a) provides, in pertinent part:

> The term "medical assistance" means payment of part or all of the cost of the following care and services * * *
>
> * * * * *
>
> (14) inpatient hospital services, skilled nursing facility services, and intermediate care facility services for individuals 65 years of age or over in an institution for tuberculosis or mental diseases;
>
> * * * * *
>
> (16) effective January 1, 1973, inpatient psychiatric hospital services for individuals under age 21, as defined in subsection (h) of this section; * * *.

42 U.S.C. (Supp. IV) 1396d(h) provides:

> (1) For purposes of paragraph (16) of subsection (a) of this section, the term "inpatient psychiatric hospital services for individuals under age 21" includes only—

> * * * * *
>
> (B) inpatient services which, in the case of any individual (i) involve active treatment which meets such standards as may be prescribed in regulations by the Secretary, and (ii) a team, consisting of physicians and other personnel qualified to make determinations with respect to mental health conditions and the treatment thereof, has determined are necessary on an inpatient basis and can reasonably be expected to improve the condition, by reason of which such services are necessary, to the extent that eventually such services will no longer be necessary; * * *.

STATEMENT

Prior to the amendment of the Social Security Act in 1965, the United States had not participated in the financing of medical care of individuals receiving long-term inpatient treatment in mental hospitals; such financing was, in principal part, the responsibility of the separate states. S. Rep. No. 89-404, 89th Cong., 1st Sess. 144-147 (1965). With the enactment of Title XIX of the Act, 42 U.S.C. 1396 *et seq.*, the federal government offered to reimburse the states for part of the cost of providing inpatient services in mental institutions for poor persons 65 years of age or older.[2]

---

[2]Section 1396d also provided for partial reimbursement for the costs of mental health treatment of needy persons of all ages in institutions providing general hospital services, where the length of treatment generally is shorter than in mental institutions, or on an outpatient basis or in intermediate care facilities. 42 U.S.C. 1396d (a)(1), (2), (9), and (15). In the field of psychiatric services for the poor, the federal effort has been designed to encourage the transfer of care of the mentally ill from custodial institutions to community facilities. *E.g.*, the Community Mental Health Centers Act, 77 Stat. 290, 42 U.S.C. 2681 *et seq.*; H.R.

Petitioner, age 34 when this litigation began, received treatment over a period of years in various facilities for the mentally disabled in New York State. At the recommendation of her physician, she was admitted to a private, non-profit hospital licensed by the State of Pennsylvania to provide inpatient treatment of the mentally ill (Pet. App. A-38). Petitioner requested that New York pay the costs of her institutional care in the Pennsylvania facility under the Medicaid program, a cooperative state-federal program in which New York participates (*ibid.*). After an administrative hearing, her request was denied on the ground that the Medicaid Act prohibits federal reimbursement of state expenditures for medical assistance provided in a mental institution to a patient under 65 years of age, and the conforming state statute barred assistance unless federal matching funds were available (Pet. App. A-34 to A-35, A-38).[3]

Rep. No. 694, 88th Cong., 1st Sess. (1963). Indeed, the Medicaid Act requires a state which received matching funds made on behalf of persons 65 years or older who are patients in mental institutions to plan and develop "alternate methods of care" and demonstrate that it "is making satisfactory progress toward developing and implementing a comprehensive mental health program, including provision for utilization of community mental health centers, nursing facilities, and other alternatives to care in public institutions for mental diseases." 42 U.S.C. 1396a(20) and (21).

[3]After the administrative decision, the Social Security Act was amended to authorize payment of federal matching funds to reimburse the states for the costs of inpatient psychiatric hospital services rendered an individual under the age of 21 when it is determined that such treatment "can reasonably be expected to improve the condition, by reason of which such services are necessary, to the extent that eventually such services will no longer be necessary * * *." 42 U.S.C. (Supp. IV) 1396d(a)(16) and (h)(1)(B).

Contrary to petitioner's statement (Pet. 12-13), the states can obtain partial reimbursement under the Medicaid Act for state expenditures for psychiatric services on behalf of (1) inpatients in mental institutions who are either 65 years of age or over or who

Petitioner thereupon instituted this class action in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief and retroactive benefits. The complaint alleged that in limiting federal reimbursement of state medical assistance provided in facilities for mental diseases to that assistance rendered to individuals over 64, or under 21, years of age, the Act arbitrarily discriminates against individuals between those ages (Pet. App. A-37 to A-38).

A three-judge district court heard the case on cross-motions for summary judgment (Pet. App. A-39 to A-40). It refused to certify the suit as a class action[4] and upheld

---

are under 21 years of age and whose mental health is capable of restoration to the point that they may rejoin society, and (2) otherwise eligible persons of any age who receive inpatient psychiatric services other than in an institution for mental diseases (Pet. App. A-41 to A-42). See 42 U.S.C. (Supp. IV) 1396d(a)(1) and (15); S. Rep. No. 92-1230, 92d Cong., 2d Sess. 280-281 (1972).

[4]Petitioner sought to represent the class of "all persons eligible for medical assistance who are between 21 and 65 years of age and are patients in institutions for mental disease and all persons eligible for medical assistance who are less than 65 years of age and are patients in institutions for tuberculosis, and whose care in either the mental disease or tuberculosis institutions is not paid for under the Medicaid program" (Pet. App. A-8).

The district court held that since petitioner does not suffer from tuberculosis, she lacked standing to sue on behalf of patients in tubercular institutions (Pet. App. A-37 n. 1). See Rule 23(a)(4), Fed. R. Civ. P. Moreover, it found that there had been no showing that any such patients had pursued administrative remedies or satisfied the jurisdictional amount (Pet. App. A-37 n. 1). Cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 763-764.

The court declined to certify the suit as a class action on behalf of patients in mental institutions on the ground that their claims were separate and distinct and could not be aggregated for purposes of the jurisdictional amount prescribed by 28 U.S.C. 1331 (Pet. App. A-39). See *Zahn* v. *International Paper Co.*, 414 U.S. 291. However, the court found that petitioner's individual claim met the jurisdictional requirements of that statute (Pet. App. A-39).

the constitutionality of the statute. The court of appeals affirmed on the basis of the district court's opinion (Pet. App. A-55 to A-57).[5]

ARGUMENT

In the absence of infringement of a fundamental constitutional right or a distinction based upon a suspect classification,[6] the standard for determining the constitutionality of a statutory classification under the Social Security Act is whether it "manifests a patently arbitrary classification, utterly lacking in rational justification." *Weinberger* v. *Salfi*, 422 U.S. 749, 768, quoting from *Flemming* v. *Nestor*, 363 U.S. 603, 611. As this Court observed in *Richardson* v. *Belcher*, 404 U.S. 78, 81, "[a] statutory classification in the area of social welfare is consistent with the Equal Protection Clause of the Fourteenth Amendment if it is 'rationally based and free from invidious discrimination' "; such a classification "is perforce consistent with the due process requirement of the Fifth Amendment." The classification challenged by petitioner rests upon a rational basis and is free from invidious discrimination.

[5]Since the three-judge district court denied relief on the merits of petitioner's constitutional claim, appeal from its denial of injunctive relief would have lain directly to this Court. *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 804. Petitioner filed a notice of appeal to this Court with the district court but never perfected that appeal. Because the court of appeals lacked jurisdiction to review the denial of injunctive relief (28 U.S.C. 1291), the propriety of that denial is not properly presented to this Court.

However, the court of appeals did have jurisdiction to review the district court's denial of declaratory relief and retroactive benefits (see *Gerstein* v. *Coe*, 417 U.S. 279), and, accordingly, those issues are properly before this Court.

[6]Apparently acknowledging the correctness of the court of appeals' decision if the constitutionality of the challenged classification is to be measured under the rational basis standard (Pet. 20-21), petitioner contends that the statute can be upheld only if justified by a compelling interest. Contrary to petitioner's assertion (Pet. 19-24), however, the statutory provision here at issue does not infringe upon any fundamental right.

1. In establishing the Medicaid program under Title XIX of the Social Security Act, 42 U.S.C. 1396d, Congress provided for partial federal reimbursement of state expenditures for certain specified categories of health services that it determined to be most critical. The stated purpose of Title XIX is to permit the states to furnish, to the extent within their means, "(1) medical assistance on behalf of families with

Unlike *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, payment of the costs of treatment for mental illness was not denied petitioner, while being granted to others, solely because she traveled from New York to Pennsylvania. She was denied assistance because of her age and the nature of the institution in which she accepted treatment, not because the treatment was rendered in an out-of-state facility. She would equally have been denied reimbursement if the treatment had been provided in a New York facility.

The restriction on Medicaid benefits does not infringe upon her fundamental right to choose the most appropriate program of medical treatment in consultation with her physician (Pet. 19-24). The statute simply establishes the terms and conditions under which the federal government will reimburse the states for assistance rendered persons treated in mental institutions. It does not interfere with the patient's right to consult the doctor of choice, nor require that the physician prescribe or refrain from prescribing any form of treatment. Accordingly, Congress has not unconstitutionally interfered with the patient's right of privacy. See *Association of American Physicians and Surgeons* v. *Weinberger*, 395 F. Supp. 125 (N.D. Ill.), affirmed, November 17, 1975, No. 75-361.

Petitioner does not contend that the challenged legislation discriminates against persons on the basis of race or nationality. Age is not a suspect classification. See *Jefferson* v. *Hackney*, 406 U.S. 535, 549.

dependent children and of aged * * * individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation * * * services to help such families and individuals attain or retain capability for independence or self-care * * * ." 42 U.S.C. (Supp. IV) 1396. Of necessity, the types of medical services for which federal matching funds can be provided to the states are limited by the fiscal constraints on the federal government's financial resources. Hearings on Medical Care for the Aged Amendments before the Senate Finance Committee, 88th Cong., 2d Sess. 33 (1964).

Congress was aware that the states had traditionally accepted responsibility for the care of the mentally ill, and it reasonably determined not to use federal funds merely to displace that health care delivery system. See H.R. Rep. No. 89-213, 89th Cong., 1st Sess. 126, 128 (1965). The principal purpose of the Medicaid Act was to expand public health assistance, not to replace state with federal aid. However, Congress rationally concluded that persons 65 years or older would tend to have a greater need for government-subsidized inpatient psychiatric services, because they are least able of all groups in society to bear these expenses themselves, and that, by reimbursing the states for such expenditures, the federal government would encourage the upgrading of treatment provided the elderly. See S. Rep. No. 89-404, 89th Cong., 1st Sess. 144-147 (1965).

In *Jefferson* v. *Hackney*, 406 U.S. 535, this Court upheld the constitutionality of a similar age classification that preferred the elderly poor over other potential public assistance recipients, based upon a legislative judgment of their particular need. By the same reasoning, as the courts below held, it was permissible

for Congress, consistent with the purposes of the Medicaid statute, to give preferential treatment to the mental care requirements of the elderly (Pet. App. A-48 to A-50).

Furthermore, as the courts below properly ruled (Pet. App. A-50 to A-52), the subsequent amendment of Title XIX to provide such matching funds for state expenditures for remedial inpatient psychiatric care for certain individuals under 21 years of age (42 U.S.C. (Supp. IV) 1396d(a)(16) and (h)) constituted a rational step toward broadening the class of persons covered by Medicaid. As the Senate Finance Committee noted (S. Rep. No. 92-1230, 92d Cong., 2d Sess. 281 (1972)):

> * * * the nation cannot make a more compassionate or better investment in medicaid than this effort to restore mentally ill children to a point where they may very well be capable of rejoining and contributing to society as active and constructive citizens.

Aid to children historically has been a principal concern of Congress in allocating Social Security benefits. In light of the enormous expense potentially involved in supplementing the traditional provision by the states[7] of psychiatric services for the mentally ill, the concentration of limited federal resources where the need and the potential response to treatment were believed

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[7]Congress estimated that in the first two calendar years of operation, the extension of these benefits to children under 21 years of age would cost approximately $224 million (Pet. App. A-46 to A-47). 118 Cong. Rec. 37354 (1972).

greatest constitutes a rational allocation of benefits in keeping with Medicaid's stated objectives.[8]

2. As the courts below recognized (Pet. App. A-40 to A-41), the constitutionality of the classification between inpatient psychiatric care rendered in mental institutions, and similar care rendered in other types of treatment centers, was established in *Legion* v. *Richardson,* 354 F. Supp. 456 (S.D. N.Y.), affirmed *sub nom. Legion* v. *Weinberger,* 414 U.S. 1058. Contrary to petitioner's argument (Pet. 32-34), the Court's summary affirmance in *Legion* was a decision on the merits and is a binding precedent. *Hicks* v. *Miranda,* 422 U.S. 332, 344-345.

3. Although Medicaid benefits may not be as comprehensive as petitioner wishes, "the Equal Protection Clause does not require that [the government] choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge* v. *Williams,* 397 U.S. 471, 486-487. The government may proceed one step at a time, dealing with the phase of the problem that appears most urgent and leaving other aspects unresolved. *Jefferson* v. *Hackney, supra; Williamson* v. *Lee Optical Co.,* 348 U.S. 483. As this Court reaffirmed in *Geduldig* v. *Aiello,* 417 U.S. 484, 495,

[8]In *Montoroula* v. *Parry,* 83 Misc. 2d 1034, 373 N.Y.S. 2d 980 (Sup. Ct.), a New York trial court held that the denial of state financial assistance to a 24-year old receiving inpatient treatment in a private mental institution under a state statute conforming to Section 1396d(a) denied him equal protection of the law, on the ground that it created an invidious discrimination among physically and mentally ill adults. Unlike the instant case, however, the state there did not contend that the age classification bore any rational relation to the objective of the statute. *Id.* at 983. In any event, this decision by a New York court of first impression, concerning the denial of benefits by a state, provides no basis for review of the decision below.

"[p]articularly with respect to social welfare programs, so long as the line drawn by the [government] is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1976.

DOJ-1976-06

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1522

SANDRA KANTROWITZ, PETITIONER

v.

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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ARGUMENT

Petitioner believes that the invidious discrimination of Title XIX of the Social Security Act is apparent. The classification employed in this statutory scheme is irrational and promotes neither actual nor conceivable objectives within the scope of federal legislative power. To observe the classification is to discern its irrationality.

Petitioner's affirmative case is set forth in her Petition for a Writ of Certiorari. Rather than reiterate those arguments, petitioner would like only to clarify certain misleading statements expressed in Respondent's brief. For purposes of efficiency, these points are itemized.

(1) On page 5, footnote 3, Respondent insinuates that there is a misstatement of the classification. Petitioner attaches the Senate Report which Respondent cites for this proposition (see Petitioner's Appendix A). The

report, in fact, specifies that the classification is the exact one defined by the statute. The exclusionary class violates the Constitution and is defined properly by Petitioner.

(2) In footnote 5, Respondent asserts that "[T]he propriety of that denial [of injunctive relief] is not properly presented to this Court." Contrary to Respondent's assertion, the three-judge district court, specifically stated that the matter was appropriately appealed to the District of Columbia Court of Appeals (on the assumption that declaratory relief would be sufficient; Petitioner's Brief for Certiorari at A-23). Citing Wright and Miller at oral argument, the District of Columbia Court of Appeals agreed, and a Protective Notice of Appeals, specifically so labeled for this Court, was timely filed. Therefore, all issues are presented to this Court.

(3) In footnote 6, Respondent states,

"She [Petitioner] would equally have been denied reimbursement if the treatment had been provided in a New York facility." This proposition misses the point. The contours of freedom of association and travel are not confined to principles of interstate movement. The right of intrastate travel is constitutionally protected, as well. See e.g., Valencia v. Bateman, 323 F.Supp. 60 (D.C. Ariz. 1971). Petitioner was dissatisfied with the method of treatment she was receiving in New York State. She chose to travel to Pennsylvania for the purposes of obtaining a different type of therapy (a type of therapy, in fact, which, itself, has undertones of constitutionally protected group association). Under established constitutional principles, the federal government may no more dictate to Petitioner where she can receive treatment as tell her what kinds of treatment are permissible (see cases cited in Petitioner's Brief for a Writ

of Certiorari at page 20). She must be free to associate where and when she chooses and for whatever reasons.

The elements in the present case are clearly reflected in Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), and the logic of that decision should apply.

(4) Respondent also states in footnote 6 that restricted benefits do not infringe on Petitioner's choice of physician. The record in this case convincingly belies that assertion. Respondent's refusal to reimburse is directly related to Petitioner's inability to continue with her present medical treatment. The situation in this case parallels Sherbert v. Verner, 374 U.S. 398, where this Court found that withholding of unemployment compensation on account of Appellant's religious principles represented infringement by the state of constitutional rights of free exercise. To deny payment is to deny treatment.

(5) On page 8, Respondent states that "Congress was aware that the states had traditionally accepted responsibility for the care of the mentally ill, and it reasonably determined not to use federal funds merely to displace that health care delivery system." Even assuming this misstatement were true, which it is not (see Petitioner's Appendix B), the fact is that Congress has chosen to act in the health care delivery area and therefore must do so in a constitutional fashion.

(6) On page 10, Respondent states that the "Court's summary affirmance in Legion ... is a binding precedent." This argument is patently wrong. The Supreme Court is never foreclosed from reviewing cases, the facts of which have previously been decided by summary affirmance. See Edelman v. Jordan, 415 U.S. 651, 676-677 (1974); Murgia v. Commonwealth, 44 USLW 5077, fn. 1.

(7) In footnote 8, page 10, Respondent

argues that "the state did not contend that the age classification bore any rational relation to the objective of the state in Montoroula v. Parry." The courts are obligated to seek any rational justification, and the state presented argument in this context. Cf. Fleming v. Nestor, 363 U.S. 603 (1960); Dandridge v. Williams, 397 U.S. 471 (1970). No justification could be found there or here.

(8) Once again, on page 10, Respondent urges the government to take "one step" at a time. However, the freedom to proceed by increments is not a license to discriminate. This is especially true when, as in the instant case, classifications are based on totally irrelevant secondary characteristics and in a crucial and constitutional domain. The government has created a program of medical assistance to inpatients in mental hospitals. The creation of that program was the "step" taken by Congress. Within that otherwise

uniform program, it cannot constitutionally arbitrarily exclude persons of a certain age in a certain institution.

CONCLUSION

For the reasons set forth above and in the petition filed herein, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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APPENDIX A

SENATE REPORT NO. 92-1230,
92d CONG., 2d SESSION 280-281, 1972

MEDICAID COVERAGE OF MENTALLY ILL CHILDREN

(Sec. 299B of the Bill)

Under present medicaid law, reimbursement for inpatient care of individuals in institutions for mental diseases is limited to those otherwise eligible individuals who are 65 years of age or older.

Matching for outpatient care for mentally ill children, as well as needy adults, is currently available under Title XIX. The committee supports use of these funds where appropriate, and believes that outpatient treatment in the patient's own community should be used wherever possible. However, in some cases, inpatient care in an institution for mental diseases is necessary.

The committee amendment would there-

fore authorize Federal matching under medicaid for eligible children, age 21 or under, receiving active care and treatment for mental diseases in an accredited medical insitution. The definitions of active care and treatment in accredited mental institutions are those applicable to psychiatric institutional care under the medicare program. An appropriate "maintenance of effort" provision is included to assure that the new Federal dollars are utilized to improve and expand treatment of mentally ill children.

The committee believes that the nation cannot make a more compassionate or better investment in medicaid than this effort to restore mentally ill children to a point where they may very well be capable of rejoining and contributing to society as active and constuctive citizens.

The committee also believes that the potential social and economic benefits of ex-

tending medicaid inpatient mental hospital coverage to mentally ill persons between the ages of 21 and 65 deserves to be evaluated and has therefore authorized demonstration projects for this purpose.

The amendment is effective January 1, 1973.

APPENDIX B

UNITED STATES COURT OF APPEALS,
FOR THE DISTRICT OF COLUMBIA

APPELLANTS BRIEF AT PAGE 21

Accepting arguendo the proposition that care of the mentally ill in state hospitals is the responsibility of the states, that justification might support a total exclusion of such institutions from federal medical assistance, as was true prior to 1965, but certainly cannot support a system of federal grants to a selected group in precisely those state institutions. The only rational exclusion based on an assertion of state responsibility for mental disease and tuberculosis hospitals would be the total exclusion of all such institutions from coverage, as was recognized by the King-Anderson bill (see, discussion in Hearings on Medical Care for the Aged Amendments, Senate Finance Committee, 88th Congress, 2d Session [1964] at 108-109).

Furthermore, the federal government participates in funding public and private psychiatric hospitals through a variety of other federal programs such as Hill-Burton and hospital improvement grants. See statement of Dr. Leonard Ganser, Hearings on H.R. 12080, Sen. Finance Comm., 90th Cong., 1st Session 1749 (1967). To assert that the federal government should not allow Medicaid assistance to patients in mental disease institutions because such institutions are the responsibility of the state governments is totally irrational in face of the extensiveness of federal aid to these institutions.*

---

*If Congress is concerned that increased federal assistance for patients in mental disease or tuberculosis institutions will result in less state assistance for the same patients and thus no net gain, there is a proven statutory device to meet this problem. To alleviate their concern that states might abandon or reduce their assistance to the mentally ill in the wake of the Medicaid program, Congress required, as a condition of receiving federal

---

money, that states increase their expenditures to mental institutions. P.L. 89-97 §1903(b). Recognizing that this requirement had succeeded in maintaining state mental hospital expenditures, Congress recently deleted this mandate. P.L. 92-603; Sen. Rep. No. 1230, 92d Cong., 2d Sess. 323 (1972).

APPENDIX D

§ 1396d. Definitions—Medical assistance

For purposes of this subchapter—

(a) The term "medical assistance" means payment of part or all of the cost of the following care and services (if provided in or after the third month before the month in which the recipient makes application for assistance) for individuals, and, with respect to physicians' or dentists' services, at the option of the State, to individuals (other than individuals with respect to whom there is being paid, or who are eligible, or would be eligible if they were not in a medical institution, to have paid with respect to them a State supplementary payment and are eligible for medical assistance equal in amount, duration, and scope to the medical assistance made available to individuals described in section 1396a(a)(10)(A) of this title) not receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV, and with respect to whom supplemental security income benefits are not being paid under subchapter XVI of this chapter, who are—

---

(17) any other medical care, and any other type of remedial care recognized under State law, specified by the Secretary;

except as otherwise provided in paragraph (16), such term does not include—

(A) any such payments with respect to care or services for any individual who is an inmate of a public institution (except as a patient in a medical institution); or

(B) any such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for tuberculosis or mental diseases.

No. 75-1522

In the Supreme Court of the United States

OCTOBER TERM, 1975

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v.

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1522

SANDRA KANTROWITZ, PETITIONER

v.

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-55 to A-57) is not yet reported. The opinion of the three-judge district court (Pet. App. A-36 to A-54) is reported at 388 F. Supp. 1127.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1976. The petition for a writ of certiorari was filed on April 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

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[1]Petitioner erroneously invokes this Court's jurisdiction under 28 U.S.C. 1253. See note 5, *infra*.

QUESTION PRESENTED

Whether Title XIX of the Social Security Act invidiously discriminates on the basis of age by denying the states reimbursement, under the federal Medicaid program, for expenditures for inpatient medical services received by individuals over 20, but under 65, years of age in institutions for mental diseases.

STATUTORY PROVISIONS INVOLVED

With the exceptions noted below, the relevant statutory provisions are set forth at Pet. App. A-58.

42 U.S.C. (Supp. IV) 1396d(a) provides, in pertinent part:

> The term "medical assistance" means payment of part or all of the cost of the following care and services * * *
>
> * * * * *
>
> (14) inpatient hospital services, skilled nursing facility services, and intermediate care facility services for individuals 65 years of age or over in an institution for tuberculosis or mental diseases;
>
> * * * * *
>
> (16) effective January 1, 1973, inpatient psychiatric hospital services for individuals under age 21, as defined in subsection (h) of this section; * * *.

42 U.S.C. (Supp. IV) 1396d(h) provides:

> (1) For purposes of paragraph (16) of subsection (a) of this section, the term "inpatient psychiatric hospital services for individuals under age 21" includes only—

> * * * * *
>
> (B) inpatient services which, in the case of any individual (i) involve active treatment which meets such standards as may be prescribed in regulations by the Secretary, and (ii) a team, consisting of physicians and other personnel qualified to make determinations with respect to mental health conditions and the treatment thereof, has determined are necessary on an inpatient basis and can reasonably be expected to improve the condition, by reason of which such services are necessary, to the extent that eventually such services will no longer be necessary; * * *.

STATEMENT

Prior to the amendment of the Social Security Act in 1965, the United States had not participated in the financing of medical care of individuals receiving long-term inpatient treatment in mental hospitals; such financing was, in principal part, the responsibility of the separate states. S. Rep. No. 89-404, 89th Cong., 1st Sess. 144-147 (1965). With the enactment of Title XIX of the Act, 42 U.S.C. 1396 *et seq.*, the federal government offered to reimburse the states for part of the cost of providing inpatient services in mental institutions for poor persons 65 years of age or older.[2]

---

[2]Section 1396d also provided for partial reimbursement for the costs of mental health treatment of needy persons of all ages in institutions providing general hospital services, where the length of treatment generally is shorter than in mental institutions, or on an outpatient basis or in intermediate care facilities. 42 U.S.C. 1396d (a)(1), (2), (9), and (15). In the field of psychiatric services for the poor, the federal effort has been designed to encourage the transfer of care of the mentally ill from custodial institutions to community facilities. *E.g.*, the Community Mental Health Centers Act, 77 Stat. 290, 42 U.S.C. 2681 *et seq.*; H.R.

Petitioner, age 34 when this litigation began, received treatment over a period of years in various facilities for the mentally disabled in New York State. At the recommendation of her physician, she was admitted to a private, non-profit hospital licensed by the State of Pennsylvania to provide inpatient treatment of the mentally ill (Pet. App. A-38). Petitioner requested that New York pay the costs of her institutional care in the Pennsylvania facility under the Medicaid program, a cooperative state-federal program in which New York participates (*ibid.*). After an administrative hearing, her request was denied on the ground that the Medicaid Act prohibits federal reimbursement of state expenditures for medical assistance provided in a mental institution to a patient under 65 years of age, and the conforming state statute barred assistance unless federal matching funds were available (Pet. App. A-34 to A-35, A-38).[3]

Rep. No. 694, 88th Cong., 1st Sess. (1963). Indeed, the Medicaid Act requires a state which received matching funds made on behalf of persons 65 years or older who are patients in mental institutions to plan and develop "alternate methods of care" and demonstrate that it "is making satisfactory progress toward developing and implementing a comprehensive mental health program, including provision for utilization of community mental health centers, nursing facilities, and other alternatives to care in public institutions for mental diseases." 42 U.S.C. 1396a(20) and (21).

[3]After the administrative decision, the Social Security Act was amended to authorize payment of federal matching funds to reimburse the states for the costs of inpatient psychiatric hospital services rendered an individual under the age of 21 when it is determined that such treatment "can reasonably be expected to improve the condition, by reason of which such services are necessary, to the extent that eventually such services will no longer be necessary * * *." 42 U.S.C. (Supp. IV) 1396d(a)(16) and (h)(1)(B).

Contrary to petitioner's statement (Pet. 12-13), the states can obtain partial reimbursement under the Medicaid Act for state expenditures for psychiatric services on behalf of (1) inpatients in mental institutions who are either 65 years of age or over or who

Petitioner thereupon instituted this class action in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief and retroactive benefits. The complaint alleged that in limiting federal reimbursement of state medical assistance provided in facilities for mental diseases to that assistance rendered to individuals over 64, or under 21, years of age, the Act arbitrarily discriminates against individuals between those ages (Pet. App. A-37 to A-38).

A three-judge district court heard the case on cross-motions for summary judgment (Pet. App. A-39 to A-40). It refused to certify the suit as a class action[4] and upheld

---

are under 21 years of age and whose mental health is capable of restoration to the point that they may rejoin society, and (2) otherwise eligible persons of any age who receive inpatient psychiatric services other than in an institution for mental diseases (Pet. App. A-41 to A-42). See 42 U.S.C. (Supp. IV) 1396d(a)(1) and (15); S. Rep. No. 92-1230, 92d Cong., 2d Sess. 280-281 (1972).

[4]Petitioner sought to represent the class of "all persons eligible for medical assistance who are between 21 and 65 years of age and are patients in institutions for mental disease and all persons eligible for medical assistance who are less than 65 years of age and are patients in institutions for tuberculosis, and whose care in either the mental disease or tuberculosis institutions is not paid for under the Medicaid program" (Pet. App. A-8).

The district court held that since petitioner does not suffer from tuberculosis, she lacked standing to sue on behalf of patients in tubercular institutions (Pet. App. A-37 n. 1). See Rule 23(a)(4), Fed. R. Civ. P. Moreover, it found that there had been no showing that any such patients had pursued administrative remedies or satisfied the jurisdictional amount (Pet. App. A-37 n. 1). Cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 763-764.

The court declined to certify the suit as a class action on behalf of patients in mental institutions on the ground that their claims were separate and distinct and could not be aggregated for purposes of the jurisdictional amount prescribed by 28 U.S.C. 1331 (Pet. App. A-39). See *Zahn* v. *International Paper Co.*, 414 U.S. 291. However, the court found that petitioner's individual claim met the jurisdictional requirements of that statute (Pet. App. A-39).

the constitutionality of the statute. The court of appeals affirmed on the basis of the district court's opinion (Pet. App. A-55 to A-57).[5]

ARGUMENT

In the absence of infringement of a fundamental constitutional right or a distinction based upon a suspect classification,[6] the standard for determining the constitutionality of a statutory classification under the Social Security Act is whether it "manifests a patently arbitrary classification, utterly lacking in rational justification." *Weinberger* v. *Salfi*, 422 U.S. 749, 768, quoting from *Flemming* v. *Nestor*, 363 U.S. 603, 611. As this Court observed in *Richardson* v. *Belcher*, 404 U.S. 78, 81, "[a] statutory classification in the area of social welfare is consistent with the Equal Protection Clause of the Fourteenth Amendment if it is 'rationally based and free from invidious discrim-

[5]Since the three-judge district court denied relief on the merits of petitioner's constitutional claim, appeal from its denial of injunctive relief would have lain directly to this Court. *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 804. Petitioner filed a notice of appeal to this Court with the district court but never perfected that appeal. Because the court of appeals lacked jurisdiction to review the denial of injunctive relief (28 U.S.C. 1291), the propriety of that denial is not properly presented to this Court.

However, the court of appeals did have jurisdiction to review the district court's denial of declaratory relief and retroactive benefits (see *Gerstein* v. *Coe*, 417 U.S. 279), and, accordingly, those issues are properly before this Court.

[6]Apparently acknowledging the correctness of the court of appeals' decision if the constitutionality of the challenged classification is to be measured under the rational basis standard (Pet. 20-21), petitioner contends that the statute can be upheld only if justified by a compelling interest. Contrary to petitioner's assertion (Pet. 19-24), however, the statutory provision here at issue does not infringe upon any fundamental right.

ination' "; such a classification "is perforce consistent with the due process requirement of the Fifth Amendment." The classification challenged by petitioner rests upon a rational basis and is free from invidious discrimination.

1. In establishing the Medicaid program under Title XIX of the Social Security Act, 42 U.S.C. 1396d, Congress provided for partial federal reimbursement of state expenditures for certain specified categories of health services that it determined to be most critical. The stated purpose of Title XIX is to permit the states to furnish, to the extent within their means, "(1) medical assistance on behalf of families with

Unlike *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, payment of the costs of treatment for mental illness was not denied petitioner, while being granted to others, solely because she traveled from New York to Pennsylvania. She was denied assistance because of her age and the nature of the institution in which she accepted treatment, not because the treatment was rendered in an out-of-state facility. She would equally have been denied reimbursement if the treatment had been provided in a New York facility.

The restriction on Medicaid benefits does not infringe upon her fundamental right to choose the most appropriate program of medical treatment in consultation with her physician (Pet. 19-24). The statute simply establishes the terms and conditions under which the federal government will reimburse the states for assistance rendered persons treated in mental institutions. It does not interfere with the patient's right to consult the doctor of choice, nor require that the physician prescribe or refrain from prescribing any form of treatment. Accordingly, Congress has not unconstitutionally interfered with the patient's right of privacy. See *Association of American Physicians and Surgeons* v. *Weinberger*, 395 F. Supp. 125 (N.D. Ill.), affirmed, November 17, 1975, No. 75-361.

Petitioner does not contend that the challenged legislation discriminates against persons on the basis of race or nationality. Age is not a suspect classification. See *Jefferson* v. *Hackney*, 406 U.S. 535, 549.

dependent children and of aged * * * individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation * * * services to help such families and individuals attain or retain capability for independence or self-care * * * ." 42 U.S.C. (Supp. IV) 1396. Of necessity, the types of medical services for which federal matching funds can be provided to the states are limited by the fiscal constraints on the federal government's financial resources. Hearings on Medical Care for the Aged Amendments before the Senate Finance Committee, 88th Cong., 2d Sess. 33 (1964).

Congress was aware that the states had traditionally accepted responsibility for the care of the mentally ill, and it reasonably determined not to use federal funds merely to displace that health care delivery system. See H.R. Rep. No. 89-213, 89th Cong., 1st Sess. 126, 128 (1965). The principal purpose of the Medicaid Act was to expand public health assistance, not to replace state with federal aid. However, Congress rationally concluded that persons 65 years or older would tend to have a greater need for government-subsidized inpatient psychiatric services, because they are least able of all groups in society to bear these expenses themselves, and that, by reimbursing the states for such expenditures, the federal government would encourage the upgrading of treatment provided the elderly. See S. Rep. No. 89-404, 89th Cong., 1st Sess. 144-147 (1965).

In *Jefferson* v. *Hackney*, 406 U.S. 535, this Court upheld the constitutionality of a similar age classification that preferred the elderly poor over other potential public assistance recipients, based upon a legislative judgment of their particular need. By the same reasoning, as the courts below held, it was permissible

for Congress, consistent with the purposes of the Medicaid statute, to give preferential treatment to the mental care requirements of the elderly (Pet. App. A-48 to A-50).

Furthermore, as the courts below properly ruled (Pet. App. A-50 to A-52), the subsequent amendment of Title XIX to provide such matching funds for state expenditures for remedial inpatient psychiatric care for certain individuals under 21 years of age (42 U.S.C. (Supp. IV) 1396d(a)(16) and (h)) constituted a rational step toward broadening the class of persons covered by Medicaid. As the Senate Finance Committee noted (S. Rep. No. 92-1230, 92d Cong., 2d Sess. 281 (1972)):

> * * * the nation cannot make a more compassionate or better investment in medicaid than this effort to restore mentally ill children to a point where they may very well be capable of rejoining and contributing to society as active and constructive citizens.

Aid to children historically has been a principal concern of Congress in allocating Social Security benefits. In light of the enormous expense potentially involved in supplementing the traditional provision by the states[7] of psychiatric services for the mentally ill, the concentration of limited federal resources where the need and the potential response to treatment were believed

---

[7]Congress estimated that in the first two calendar years of operation, the extension of these benefits to children under 21 years of age would cost approximately $224 million (Pet. App. A-46 to A-47). 118 Cong. Rec. 37354 (1972).

greatest constitutes a rational allocation of benefits in keeping with Medicaid's stated objectives.[8]

2. As the courts below recognized (Pet. App. A-40 to A-41), the constitutionality of the classification between inpatient psychiatric care rendered in mental institutions, and similar care rendered in other types of treatment centers, was established in *Legion* v. *Richardson,* 354 F. Supp. 456 (S.D. N.Y.), affirmed *sub nom. Legion* v. *Weinberger,* 414 U.S. 1058. Contrary to petitioner's argument (Pet. 32-34), the Court's summary affirmance in *Legion* was a decision on the merits and is a binding precedent. *Hicks* v. *Miranda,* 422 U.S. 332, 344-345.

3. Although Medicaid benefits may not be as comprehensive as petitioner wishes, "the Equal Protection Clause does not require that [the government] choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge* v. *Williams,* 397 U.S. 471, 486-487. The government may proceed one step at a time, dealing with the phase of the problem that appears most urgent and leaving other aspects unresolved. *Jefferson* v. *Hackney, supra; Williamson* v. *Lee Optical Co.,* 348 U.S. 483. As this Court reaffirmed in *Geduldig* v. *Aiello,* 417 U.S. 484, 495,

[8]In *Montoroula* v. *Parry,* 83 Misc. 2d 1034, 373 N.Y.S. 2d 980 (Sup. Ct.), a New York trial court held that the denial of state financial assistance to a 24-year old receiving inpatient treatment in a private mental institution under a state statute conforming to Section 1396d(a) denied him equal protection of the law, on the ground that it created an invidious discrimination among physically and mentally ill adults. Unlike the instant case, however, the state there did not contend that the age classification bore any rational relation to the objective of the statute. *Id.* at 983. In any event, this decision by a New York court of first impression, concerning the denial of benefits by a state, provides no basis for review of the decision below.

"[p]articularly with respect to social welfare programs, so long as the line drawn by the [government] is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1976.

DOJ-1976-06

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1522

SANDRA KANTROWITZ, PETITIONER

v.

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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ARGUMENT

Petitioner believes that the invidious discrimination of Title XIX of the Social Security Act is apparent. The classification employed in this statutory scheme is irrational and promotes neither actual nor conceivable objectives within the scope of federal legislative power. To observe the classification is to discern its irrationality.

Petitioner's affirmative case is set forth in her Petition for a Writ of Certiorari. Rather than reiterate those arguments, petitioner would like only to clarify certain misleading statements expressed in Respondent's brief. For purposes of efficiency, these points are itemized.

(1) On page 5, footnote 3, Respondent insinuates that there is a misstatement of the classification. Petitioner attaches the Senate Report which Respondent cites for this proposition (see Petitioner's Appendix A). The

report, in fact, specifies that the classification is the exact one defined by the statute. The exclusionary class violates the Constitution and is defined properly by Petitioner.

(2) In footnote 5, Respondent asserts that "[T]he propriety of that denial [of injunctive relief] is not properly presented to this Court." Contrary to Respondent's assertion, the three-judge district court, specifically stated that the matter was appropriately appealed to the District of Columbia Court of Appeals (on the assumption that declaratory relief would be sufficient; Petitioner's Brief for Certiorari at A-23). Citing Wright and Miller at oral argument, the District of Columbia Court of Appeals agreed, and a Protective Notice of Appeals, specifically so labeled for this Court, was timely filed. Therefore, all issues are presented to this Court.

(3) In footnote 6, Respondent states,

"She [Petitioner] would equally have been denied reimbursement if the treatment had been provided in a New York facility." This proposition misses the point. The contours of freedom of association and travel are not confined to principles of interstate movement. The right of intrastate travel is constitutionally protected, as well. See e.g., Valencia v. Bateman, 323 F.Supp. 60 (D.C. Ariz. 1971). Petitioner was dissatisfied with the method of treatment she was receiving in New York State. She chose to travel to Pennsylvania for the purposes of obtaining a different type of therapy (a type of therapy, in fact, which, itself, has undertones of constitutionally protected group association). Under established constitutional principles, the federal government may no more dictate to Petitioner where she can receive treatment as tell her what kinds of treatment are permissible (see cases cited in Petitioner's Brief for a Writ

of Certiorari at page 20). She must be free to associate where and when she chooses and for whatever reasons.

The elements in the present case are clearly reflected in Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), and the logic of that decision should apply.

(4) Respondent also states in footnote 6 that restricted benefits do not infringe on Petitioner's choice of physician. The record in this case convincingly belies that assertion. Respondent's refusal to reimburse is directly related to Petitioner's inability to continue with her present medical treatment. The situation in this case parallels Sherbert v. Verner, 374 U.S. 398, where this Court found that withholding of unemployment compensation on account of Appellant's religious principles represented infringement by the state of constitutional rights of free exercise. To deny payment is to deny treatment.

(5) On page 8, Respondent states that "Congress was aware that the states had traditionally accepted responsibility for the care of the mentally ill, and it reasonably determined not to use federal funds merely to displace that health care delivery system." Even assuming this misstatement were true, which it is not (see Petitioner's Appendix B), the fact is that Congress has chosen to act in the health care delivery area and therefore must do so in a constitutional fashion.

(6) On page 10, Respondent states that the "Court's summary affirmance in Legion ... is a binding precedent." This argument is patently wrong. The Supreme Court is never foreclosed from reviewing cases, the facts of which have previously been decided by summary affirmance. See Edelman v. Jordan, 415 U.S. 651, 676-677 (1974); Murgia v. Commonwealth, 44 USLW 5077, fn. 1.

(7) In footnote 8, page 10, Respondent

argues that "the state did not contend that the age classification bore any rational relation to the objective of the state in Montoroula v. Parry." The courts are obligated to seek any rational justification, and the state presented argument in this context. Cf. Fleming v. Nestor, 363 U.S. 603 (1960); Dandridge v. Williams, 397 U.S. 471 (1970). No justification could be found there or here.

(8) Once again, on page 10, Respondent urges the government to take "one step" at a time. However, the freedom to proceed by increments is not a license to discriminate. This is especially true when, as in the instant case, classifications are based on totally irrelevant secondary characteristics and in a crucial and constitutional domain. The government has created a program of medical assistance to inpatients in mental hospitals. The creation of that program was the "step" taken by Congress. Within that otherwise

uniform program, it cannot constitutionally arbitrarily exclude persons of a certain age in a certain institution.

CONCLUSION

For the reasons set forth above and in the petition filed herein, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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APPENDIX A

SENATE REPORT NO. 92-1230,
92d CONG., 2d SESSION 280-281, 1972

MEDICAID COVERAGE OF MENTALLY ILL CHILDREN

(Sec. 299B of the Bill)

Under present medicaid law, reimbursement for inpatient care of individuals in institutions for mental diseases is limited to those otherwise eligible individuals who are 65 years of age or older.

Matching for outpatient care for mentally ill children, as well as needy adults, is currently available under Title XIX. The committee supports use of these funds where appropriate, and believes that outpatient treatment in the patient's own community should be used wherever possible. However, in some cases, inpatient care in an institution for mental diseases is necessary.

The committee amendment would there-

fore authorize Federal matching under medicaid for eligible children, age 21 or under, receiving active care and treatment for mental diseases in an accredited medical insitution. The definitions of active care and treatment in accredited mental institutions are those applicable to psychiatric institutional care under the medicare program. An appropriate "maintenance of effort" provision is included to assure that the new Federal dollars are utilized to improve and expand treatment of mentally ill children.

The committee believes that the nation cannot make a more compassionate or better investment in medicaid than this effort to restore mentally ill children to a point where they may very well be capable of rejoining and contributing to society as active and constuctive citizens.

The committee also believes that the potential social and economic benefits of ex-

tending medicaid inpatient mental hospital coverage to mentally ill persons between the ages of 21 and 65 deserves to be evaluated and has therefore authorized demonstration projects for this purpose.

The amendment is effective January 1, 1973.

APPENDIX B

UNITED STATES COURT OF APPEALS,
FOR THE DISTRICT OF COLUMBIA

APPELLANTS BRIEF AT PAGE 21

Accepting arguendo the proposition that care of the mentally ill in state hospitals is the responsibility of the states, that justification might support a total exclusion of such institutions from federal medical assistance, as was true prior to 1965, but certainly cannot support a system of federal grants to a selected group in precisely those state institutions. The only rational exclusion based on an assertion of state responsibility for mental disease and tuberculosis hospitals would be the total exclusion of all such institutions from coverage, as was recognized by the King-Anderson bill (see, discussion in Hearings on Medical Care for the Aged Amendments, Senate Finance Committee, 88th Congress, 2d Session [1964] at 108-109).

Furthermore, the federal government participates in funding public and private psychiatric hospitals through a variety of other federal programs such as Hill-Burton and hospital improvement grants. See statement of Dr. Leonard Ganser, Hearings on H.R. 12080, Sen. Finance Comm., 90th Cong., 1st Session 1749 (1967). To assert that the federal government should not allow Medicaid assistance to patients in mental disease institutions because such institutions are the responsibility of the state governments is totally irrational in face of the extensiveness of federal aid to these institutions.*

---

*If Congress is concerned that increased federal assistance for patients in mental disease or tuberculosis institutions will result in less state assistance for the same patients and thus no net gain, there is a proven statutory device to meet this problem. To alleviate their concern that states might abandon or reduce their assistance to the mentally ill in the wake of the Medicaid program, Congress required, as a condition of receiving federal

money, that states increase their expenditures to mental institutions. P.L. 89-97 §1903(b). Recognizing that this requirement had succeeded in maintaining state mental hospital expenditures, Congress recently deleted this mandate. P.L. 92-603; Sen. Rep. No. 1230, 92d Cong., 2d Sess. 323 (1972).